Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARILYN WHEELER,

Petitioner,

v.

MAIN HURDMAN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

LEONARD P. NOVELLO
General Counsel
RICHARD I. MILLER
Associate General Counsel
PEAT MARWICK MAIN & CO.
Park Avenue Plaza
55 E 52d Street
New York, NY 10155
(212) 758-9700

JACQUES M. WOOD
(Counsel of Record)
JOHN G. GREENO
CLARE M. WATT
BUERKMAN RUSLANDER POHL
LIEBER & ENGEL
40th Floor, One Oxford Centre
Pittsburgh, PA 15219-6498
(412) 392-2068

JIM CLARK
BAKER & HOSTETLER
303 East 17th Avenue
Suite 1100
Denver, CO 80203
(303) 861-0600

GERALDS P. NORTON
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether under the federal laws concerning discrimination in employment a partner of a bona fide general partnership, who is thus an "employer," is also an "employee" of the partnership.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
THE PROCEEDINGS BELOW	4
REASONS FOR DENYING THE WRIT	8
I. DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT	8
II. THE DECISION BELOW WAS CORRECT	11
III. THE DECISION BELOW DOES NOT WARRANT REVIEW ABSENT A CONFLICT OR A SHOWING THAT IT IS ERRONEOUS	13
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) 8

California v. Rooney, 107 S. Ct. 2852 (1987) 11

Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144 (S.D.N.Y. 1987) 9

EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984) 10

EEOC v. Peat, Marwick, Mitchell & Co., 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986) 10

Hishon v. King & Spalding, 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 69 (1984) 9

Hishon v. King & Spalding, 467 U.S. 69 (1984) 9

Holland v. Ernst & Whinney, 35 E.P.D. (CCH) ¶ 34,653 (N.D. Ala. 1984) 9

Hyland v. New Haven Radiology Assocs., 794 F.2d 793 (2d Cir. 1986) 10

Lettich v. Kenway, 590 F. Supp. 1225 (D. Mass. 1984) 5

Maher v. Price Waterhouse, Civ. No. 84-1522(C)(2) (E.D. Mo. April 8, 1985), *appeal dismissed per stipulation* (8th Cir. Jan. 17, 1986) 9

Tenney v. Insurance Co. of N. Am., 409 F. Supp. 746 (S.D.N.Y. 1975) 12

STATUTES

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982) 4,5

Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982) 4,5,8

Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982) 4

Table of Authorities Continued

	Page
Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1982)	4,5
59 Pa. Cons. Stat. Ann. § 706	11
MISCELLANEOUS	
110 Cong. Rec. 7,216 (daily ed. April 8, 1964)	5
EEOC Dec. No. 85-4, E.P.D. (CCH) ¶ 6,846 (1985)	6
EEOC Notice No. 915.007, CCH EEOC Compliance Manual ¶ 2,160 (1987)	6
Statistical Abstract of the United States 506 (1987)	13
Uniform Partnership Act § 15	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-666

MARILYN WHEELER,

Petitioner,

v.

MAIN HURDMAN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Tenth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Petitioner is a female over 40 (Pet. App. 3-1, 3-8).[1] For several years prior to April 1982 petitioner was employed by respondent Main Hurdman ("the Firm") in such capacities as a staff accountant, senior accountant, supervisor and manager (*id.* at 3-3).[2] Effective April 1, 1982, petitioner ceased to be an

---

[1] "Pet." refers to the petition for certiorari. "Pet. App." refers to the appendices to the petition.

[2] Effective April 1, 1987, respondent merged to become part of a partnership now known as Peat Marwick Main & Co.

employee of respondent upon her election to, and her voluntary acceptance of, partnership in the Firm (*id.* at 4-1). In that capacity, petitioner concededly was a bona fide general partner of a bona fide general partnership, and does not claim that the Firm's election of her to partnership was a sham to evade any employment discrimination laws (*id.* at 1-7, 3-3, 3-5).

When petitioner accepted the Firm's invitation to become a partner and hence an employer, rather than an employee, the following significant changes occurred in her relationship to the Firm:

a. Instead of a fixed salary, she received an agreed share of the Firm's net income (or losses) (*id.* at 4-1, 5-3);

b. She paid for certain benefits she had enjoyed without cost as an employee of the Firm, including prepaid health insurance and life insurance (*id.* at 4-1);

c. She became obligated to make significant capital contributions to the Firm, both immediately and over time (*id.* at 4-1, 5-4);[3]

d. She had an equal vote with all other partners (each partner having one vote) in deciding such important Firm matters as:

   1) amendments to the Partnership Agreement,

---

[3] The record is not clear as to the total amount of capital petitioner would have been obliged to pay in, nor how much she had already paid in when she withdrew from the partnership. She acknowledges an initial cash contribution of $4,000 (Pet. App. at 5-4), and her letter of withdrawal showed that her capital account at that time already contained more than $15,000 (*id.* at 4-2 to 4-3).

2) approval of mergers,

3) admission of new partners,

4) approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partner,

5) termination of a partner's interest, and

6) dissolution of the Firm (*id.* at 4-1 to 4-2, 5-4);

e. She became personally liable to third parties for the debts and obligations of the Firm (*id.* at 4-2, 5-4); and

f. She agreed to be subject to involuntary termination of her interest in the partnership only by a unanimous vote of the Firm's Policy Board, an affirmative vote of no less than 75 percent of the members of the Firm's Advisory Board, or an affirmative vote of no less than 75 percent of all of the Firm's partners casting votes (*id.* 4-2, 5-4).

Petitioner withdrew from the partnership effective September 30, 1983 (*id.* at 4-2),[4] and in January 1984 filed charges of alleged sex and age discrimination with the Equal Employment Opportunity Commission ("EEOC") (*id.* at 3-6, 3-8). In October 1984, without addressing the merits of her charges, EEOC issued petitioner a Notice of Right to Sue (*id.* at 3-6).

---

[4] The parties disagree over whether or not petitioner's withdrawal may be deemed involuntary (*compare* Pet. App. 5-5 *with* Pet. App. 4-2).

THE PROCEEDINGS BELOW

Petitioner filed a complaint against respondent in January 1985 in the United States District Court for the District of Colorado, alleging that the Firm discriminated against her when she was one of its partners. She claimed that she was terminated because of her age or sex, or both, and that she had been compensated less favorably than partners who were male, or younger. Petitioner asserted that her termination and such alleged discrimination as to her compensation violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* (1982); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* (1982); and the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982), a subpart of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.* (1982) (*id.* at 3-5 to 3-9).

Respondent moved to dismiss, contending that at the time of the alleged discrimination petitioner, as a general partner, was not an "employee" of the Firm, a necessary condition for application of those employment discrimination laws. Respondent filed an affidavit setting forth certain facts evidencing petitioner's partnership status at the time of the alleged discrimination (*id.* at 4-1), and petitioner filed an affidavit in opposition (*id.* at 5-1).

The district court (Carrigan, J.) denied respondent's motion, finding that for the purposes of the employment discrimination laws petitioner was an "employee" of the Firm even when she was one of its bona fide partners. In its three-paragraph decision the court based its conclusion upon three factors: the power to hire or fire; supervision of work schedules

and conditions of employment; and control of compensation (*id.* at 2-1).

On the firm's appeal pursuant to 28 U.S.C. § 1292(b) (1982), the United States Court of Appeals for the Tenth Circuit reversed, holding that "bona fide general partners are not employees" under the employment discrimination acts and that petitioner, "as an acknowledged general partner of Main Hurdman, was not covered by the Acts" (*id.* at 1-40).[5]

Although the definition of "employer" unqualifiedly includes "partnerships,"[6] the court concluded that the definition of "employee" in the relevant statutes, *i.e.*, "an individual employed by an employer,"[7] was "circular" (*id.* at 1-11). The court further observed that "[a]ll parties acknowledge that nothing in the legislative history of these Acts explicitly addresses the definition of employee" (*id.* at 1-11 to 1-12).[8]

Reviewing the case law and commentary, the court found that "not one court has applied the Acts to a

---

[5] EEOC appeared as amicus curiae in support of petitioner. As the court of appeals noted, neither petitioner nor EEOC significantly relied on or defended the rationale of the district court (Pet. App. 1-24).

[6] 29 U.S.C. §§ 203(a), (d), 630(a)(b) (1982); 42 U.S.C. §§ 2000e(a), (b) (1982); *see Lettich v. Kenway*, 590 F. Supp. 1225, 1227 (D. Mass. 1984) (individual partners are "employers" under ADEA).

[7] 29 U.S.C. § 630(b) (1982) (ADEA); 42 U.S.C. § 2000e(b) (1982) (Title VII); *see* 29 U.S.C. § 203(d) (1982) (FLSA).

[8] As the court noted, the Senate debates on Title VII indicate "that the term 'employer' was 'intended to have its common dictionary meaning, except as expressly qualified by the act' " (Pet. App. 1-12 n.13, citing 110 Cong. Rec. 7,216 (daily ed. April 8, 1964)).

bona fide general partner against his or her partners or partnership" (*id.* at 1-17), and that "courts have shown no disposition to extend these statutory employee protections to general partners" (*id.* at 1-12). Looking to the law concerning partnership status in other contexts, the court likewise found "no * * * trend to erase the traditional line between partners and employees" (*id.* at 1-21).

The court further found "no directly relevant published agency positions regarding the ADEA and FLSA" (*id.* at 1-15). As to Title VII, the court found "relative silence and inaction by EEOC," which in its few pronouncements "has not historically espoused the stand it takes here,"[9] *i.e.*, that the status of a bona fide general partner as an "employee" turns on a "hybrid," intensely factual case-by-case analysis of "economic reality" in light of some dozen or more factors (*id.* at 1-24 to 1-25).[10] Petitioner took a similar position, arguing that a bona fide partner's status as an "employee" turns on a fact-specific analysis of five

---

[9] In its only formal decision on the issue EEOC ruled that none of the eight partners of a law firm was an "employee" under Title VII, where they had an equal voice in control and management and shared profits and losses by agreed percentages, those being the "relevant factors" EEOC then identified. EEOC Dec. No. 85-4, E.P.D. (CCH) ¶ 6,846 (1985).

[10] The court summarized EEOC's position as looking to "the right to control the means and manner of the worker's performance" plus an additional 11 factors (Pet. App. 1-24 to 1-25). More recently, in guidelines issued shortly before the decision below, EEOC announced a somewhat different test comprised of four factors and four subfactors. EEOC Notice No. 915.007, CCH EEOC Compliance Manual ¶ 2,160 (1987).

factors intended to probe "economic reality" (*id.* at 1-27 to 1-28).[11]

After careful consideration the court of appeals rejected both approaches, for several reasons: (1) The multi-factor "economic reality" tests were based on cases involving the analytically different question whether an individual is an "independent contractor" or an "employee," and were "largely useless in the general partnership context" (*id.* at 1-29 to 1-30). (2) Those tests "do not encompass reasonable limits," and might result in treating virtually all partners as "employees" (*id.* at 1-31 to 1-33). (3) Such tests would make an individual's status as an "employee" subject to uncertainty and change over time, producing a "potentially chaotic situation" (*id.* at 1-33 to 1-34). (4) Because partnership is based on agreement, the asserted "domination" and "control" of a partner by his or her partners was better described as an agreed abdication of rights by the partner (*id.* at 1-33), and the characteristics of partnership typically provided by agreement among the partners (and as provided in this case) were neither coextensive nor even consonant with "employee" status (*id.* at 1-34 to 1-35). (5) The proffered tests give little or no effect to a central "economic reality of partnership status itself," *i.e.*, unlimited personal liability to third parties based on the acts or omissions of other partners (*id.* at 1-34).

---

[11] The court summarized petitioner's position as turning on: " '(1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business; (4) the permanence of the working relationship; and (5) the degree of skill required to perform the work' " (Pet. App. 1-27 to 1-28).

The court concluded that Congress' "[u]se of 'employee' instead of a broader designation provides its own exclusion of bona fide general partners" (*id.* at 1-37 to 1-38), and that such categorical exclusion of partners of a bona fide partnership "will allow administration of the Acts without resort to a case-by-case approach based on illogical, unsatisfactory types of tests such as those proposed here" (*id.* at 1-38 to 1-39). Limiting this conclusion to bona fide partnerships, however, the court added that partnerships obviously cannot "admit one to the partnership merely as a device for avoiding application of the Acts" (*id.* at 1-39 to 1-40), something not at issue here.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

As petitioner tacitly acknowledges, the decision below does not conflict with the decision of any other court of appeals. The only other court of appeals decision resolving the issue is in accord, as are the dicta in other appellate decisions involving partnerships. Petitioner's claim of an "inferential" conflict (Pet. 13 n.11) with dicta in other cases is unfounded.

The only other court of appeals decision on the question whether a partner in a bona fide partnership may be regarded as an "employee" for purposes of employment discrimination laws is *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977). In *Burke* the Seventh Circuit upheld dismissal of a Title VII action, finding that partners of a public accounting firm were not "employees," and thus the partnership was not a covered employer because they did not employ 15 or more "employees." *See* 42 U.S.C. § 2000e(b) (1982).

The court held that the partners joined together to carry on a business as "co-owners," shared control of the business, and shared in profits and losses, and therefore could not be regarded as "employees" under Title VII. 556 F.2d at 869.[12]

In *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *rev'd on other grounds*, 467 U.S. 69 (1984), the Eleventh Circuit similarly concluded that partners of a law firm are not "employees" under Title VII (678 F.2d at 1027-28) in holding that Title VII does not apply to a partnership's consideration of employees for election to partnership. This Court reversed that narrow holding, finding that consideration for partnership was a "term, condition or privilege" of employment as an associate. 467 U.S. at 76-77. However, this Court did not disturb the Eleventh Circuit's conclusion that a general partner of a bona fide partnership is not an "employee" under Title VII. To the contrary, this Court observed that the "employment" status "necessarily ends when an associate becomes a partner." *Id.* at 77. *See also id.* at 79 (Powell, J., concurring) ("The reasoning of the Court's opinion

---

[12] Also consistent with the decision below as to the ADEA are the district court decisions in *Holland v. Ernst & Whinney*, 35 E.P.D. (CCH) ¶ 34,653 (N.D. Ala. 1984), and *Maher v. Price Waterhouse*, Civ. No. 84-1522(C)(2) (E.D. Mo. April 8, 1985), *appeal dismissed per stipulation* (8th Cir. Jan. 17, 1986). Petitioner notes the recent decision in *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 (S.D.N.Y. 1987) (Pet. 16), but there the district court (prior to the decision below) was acting on a motion for judgment on the pleadings in an ADEA action brought by a former partner, and was thus required to deny the motion if the plaintiff might offer any facts supporting his allegation that he was more properly viewed as an "employee." It was not a ruling on the merits of the question.

does not require that the relationship among partners be characterized as an employment relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee * * *.").[13]

Petitioner also relies upon decisions that did not involve partnerships at all, but rather professional corporations. *EEOC v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984); *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986). However, those decisions address a significantly distinct issue -- the status of a shareholder in such a corporation -- and are not in conflict with the decision below. While the courts differed in their characterization of such shareholders, they agreed that a bona fide partner is not an "employee" of the partnership. *Dowd*, 736 F.2d at 1178; *Hyland*, 794 F.2d at 797.

In short, the decision below is fully consistent with the decisions of the other courts of appeals that have addressed this issue in concluding that a partner of a bona fide general partnership is not an "employee"

---

[13] Petitioner suggests a conflict with *EEOC v. Peat, Marwick, Mitchell & Co.*, 775 F.2d 928 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986), but there the Eighth Circuit merely permitted enforcement of an EEOC subpoena issued to an accounting partnership in an investigation of whether the firm's retirement practices violated the ADEA. The court stated that the firm "has not questioned the relevancy of the documents" and ruled that it would not decide in the subpoena enforcement context the question whether the ADEA could be applied to partners. 775 F.2d at 930.

of that partnership.[14] There is no conflict requiring resolution by this Court.[15]

II. THE DECISION BELOW WAS CORRECT

Petitioner has made no serious attempt to demonstrate that the court of appeals erred in its comprehensive and careful analysis of the issues. Indeed, none of the cases petitioner relies upon has set forth a comparably complete consideration of the competing arguments. Apart from disagreeing with the ultimate result, petitioner has pointed to no aspect of the court's decision that is wrong.

The only comment petitioner makes about the correctness of the decision below is to assert that it

---

[14] Petitioner makes an irrelevant reference to a Pennsylvania law that permits a special type of partnership, known as an "elective" partnership as opposed to a "general" partnership, to employ partners as employees (Pet. 8 n.3, citing 59 Pa. Cons. Stat. Ann. § 706 (Purdon 1983)). However, there has been no claim that respondent is such an "elective" partnership, and petitioner has conceded that it is a bona fide "general" partnership under state law (Pet. 10; Pet. App. 3-1).

[15] Petitioner asserts that the opinions of other courts of appeals reflect "confusion" as to whether and on what basis courts or agencies may "look behind the label" and conclude that a person is an "employee" for purposes of the employment discrimination laws "even though a 'partner' as a matter of state law" for all other purposes (Pet. 13 n.11, 15, 16). But petitioner makes no claim that the decision below reflected any such confusion; to the contrary, she has acknowledged that the court was willing to "go behind the 'partner' label" (Pet. 17). Moreover, petitioner has cited no court of appeals decision that would have required a different judgment in this case, and at bottom she raises a question only as to whether the court's opinion stated the correct rationale. However, "[t]his Court 'reviews judgments, not statements in opinions.' " *E.g.*, *California v. Rooney*, 107 S. Ct. 2852, 2854 (1987).

"focuses on a single and apparently determinative fact," *i.e.*, the unlimited personal liability of partners, even if the individual has only "an infinitesimal share of the partnership's liability * * *" (Pet. 17). However, as the court's decision shows, the court did *not* focus upon unlimited liability as the single, determinative factor; it was merely one of a number of cogent reasons for the court's decision (*see* pp. 5-8 *supra*). Moreover, petitioner has overlooked the difference between the agreed limits on her share of liabilities as among the partners, and her exposure to unlimited personal liability to third parties, without regard to the limitations of the partnership agreement.[16]

We see no need to add to the decision below with respect to its correctness except to stress one point in particular, the court's observation that the highly factual, multiple-factor approaches of petitioner and EEOC both would produce an unstable, "chaotic" situation in which a person's status as either an "employee" covered by these laws, or as a partner who is not covered, could be constantly changing. It is crucially important for employers and for enforcers to be able readily to determine a person's status, for it governs not only the application of the laws to the entire enterprise (which turns on the number of "employees") but also their application to particular persons (*e.g.*, whether a partner is subject to mandatory retirement). The court below was correct in concluding that the legislative goals are best served by relatively clear definitions the application of which does

---

[16] *See, e.g.*, Uniform Partnership Act § 15; *Tenney v. Insurance Co. of N. Am.*, 409 F. Supp. 746, 749 (S.D.N.Y. 1975).

not fluctuate with day-to-day changes in a variety of factors.

III. THE DECISION BELOW DOES NOT WARRANT REVIEW ABSENT A CONFLICT OR A SHOWING THAT IT IS ERRONEOUS

Petitioner's primary contention is that the question presented merits a place on this Court's crowded docket even without a conflict among the circuits or a demonstration that it appears to have been wrongly decided. However, despite the large number of partnerships,[17] the two decades or more since the employment discrimination laws were enacted have produced only a handful of decisions, and the issue does not arise with great frequency.[18] Moreover, the cogency and comprehensiveness of the decision below is likely to dispel any asserted "confusion" among the lower courts in considering claims that a general partner in a bona fide partnership is an "employee." If and when other courts of appeals reject the decision below it will be time enough for this Court to address the question presented.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

---

[17] As of 1983 there were more than 1.5 million partnerships including over 10.5 million partners, of whom nearly 1.3 million were in service partnerships. *Statistical Abstract of the United States* 506 (1987).

[18] We are aware of no reported enforcement action in which the government has sued a partnership alleging that a partner is an "employee" for purposes of any employment discrimination statute.

Respectfully submitted,

Of Counsel:
LEONARD P. NOVELLO
General Counsel
RICHARD I. MILLER
Associate General Counsel
PEAT MARWICK MAIN & CO.
Park Avenue Plaza
55 E 52d Street
New York, NY 10155
(212) 758-9700

JIM CLARK
BAKER & HOSTETLER
303 East 17th Avenue
Suite 1100
Denver, CO 80203
(303) 861-0600

JACQUES M. WOOD
(Counsel of Record)
JOHN G. GREENO
CLARE M. WATT
BUERKMAN RUSLANDER POHL
LIEBER & ENGEL
40th Floor, One Oxford Centre
Pittsburgh, PA 15219-6498
(412) 392-2068

GERALDS P. NORTON
PEPPER, HAMILTON & SCHEETZ
1777 F Street, N.W.
Washington, D.C. 20006
(202) 842-8100

Attorneys for Respondent